INTERIOR BOARD OF INDIAN APPEALS

Eric Scott Thomson v. Acting Pacific Regional Director, Bureau of Indian Affairs

40 IBIA 36 (06/29/2004)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ERIC SCOTT THOMSON, Appellant,	:	Order Affirming Decision in Part, as Modified, and Vacating and Remanding in Part
v.	:	
ACTING PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	:	Docket No. IBIA 03-76-A June 29, 2004

Eric Scott Thomson (Appellant) appeals a February 26, 2003, decision of the Acting Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director affirmed a decision by the Superintendent, Southern California Agency, BIA, finding that Appellant is in trespass on certain individually-owned Indian allotted trust lands located within the reservation of the Pala Band of Mission Indians (Tribe). For the reasons discussed below, the Board of Indian Appeals (Board) affirms, as modified, the portions of the Regional Director's decision finding that Appellant is in trespass and ordering him to cease and desist the trespass by removing vehicles, equipment, materials, and structures from the trust lands. The Board vacates the portion of the Regional Director's decision ordering Appellant to conduct restoration actions, and remands that issue for further consideration. The Board declines to consider Appellant's challenge to BIA's finding that he violated a tribal solid waste disposal ordinance, because Appellant failed to raise this argument in his initial appeal to the Regional Director.

Since 1996, Appellant has occupied certain individually-owned Indian allotted trust lands located within the Tribe's reservation by placing automobiles and automobile parts on the property, along with various related materials, structures, and equipment. Appellant describes himself as a collector of vintage motor vehicles. BIA describes Appellant's activities as a junkyard storage and salvage operation. Appellant's activities apparently occupy between 2 and 3.5 acres of individual Indian trust land. The record indicates that Appellant at one time wasassociated with another individual, Jack Stanley, who was involved in the same or similar activities, which BIA found were taking place on approximately 10.75 acres of Indian trust land, encumbering seven separate allotments, Pala Allotments 16, 17-B, 18, 31, 32-A,

33-B, and 121-C. Mr. Stanley eventually removed his portion of the operation, leaving Appellant's activities on a smaller amount of acreage within the 10.75 acres. 1/

In a decision issued on June 18, 2002, the Superintendent found that Appellant was in possession of individually-owned Indian trust land without a written lease approved by BIA. Relying on 25 U.S.C. § 415, the Superintendent concluded that Appellant was trespassing on Indian trust land in violation of federal law. Section 415 provides that "[a]ny restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior * * *."

The Superintendent's letter also stated that "it has been further determined that you are in violation of the Tribe's established ordinance entitled 'An Ordinance Establishing Rules and Regulations Governing the Pala Utility District.'" (Letter from Townsend to Thompson 2/ of June 18, 2002.) The Superintendent concluded that Appellant's operation was illegal and illegally located on individual Indian trust land. The Superintendent ordered Appellant, within 30 days of his receipt of the decision, to "cease and desist" his operations on the land, remove all surface and subsurface structures and materials from the site, and restore the land to its original state prior to Appellant's occupancy. Id.

Appellant appealed the Superintendent's decision to the Regional Director. On February 26, 2003, the Regional Director affirmed the Superintendent's decision ordering Appellant to cease and desist operations, remove materials from the site, and restore the land to its original state prior to occupancy. In addition to 25 U.S.C. § 415, the Regional Director also relied on 25 C.F.R. Part 162, which governs leases and permits for Indian lands in trust or restricted status. In his decision, the Regional Director repeated the statement that Appellant had violated the Tribe's solid waste disposal ordinance. Appellant then appealed the Regional Director's decision to the Board.

On appeal, Appellant does not dispute BIA's finding that he is occupying Indian trust land, and does not dispute BIA's finding that he does not have a written lease or other written agreement with the landowners, approved by BIA. Appellant contends, however, that he has received oral consent from one or more of the individual Indian owners to occupy and use the

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1/ For purposes of deciding this appeal, it is not necessary for the Board to determine the precise location and amount of acreage occupied by Appellant on these trust allotments, because the same relevant facts and law apply, regardless of which specific allotments, of the seven, Appellant occupies.

2/ The administrative record and the pleadings filed with the Board contain inconsistent spellings of Appellant's last name. Appellant's notice of appeal spells his name "Thomson."

property. Appellant argues that because he has received such oral consent, he cannot be considered to be in trespass under state or federal law. Appellant also challenges BIA's order that he restore the property to its original state prior to his occupancy as unclear in scope and effect under the facts of this case. Finally, Appellant contends that BIA's finding that he violated the Tribe's solid waste disposal ordinance is not factually supported.

Appellant's contention that he cannot be in trespass because he has received the consent of certain Indian landowners is without merit. In Jackson v. Portland Area Director, 35 IBIA 197 (2000), the appellant there similarly argued that he was not in trespass on Indian trust lands because he had a holdover tenancy, a right of occupation recognized in both general federal law and state law. The Board responded: "Although the principle Appellant describes is sound, it has no application here. In this case, there is a Federal statute directly on point. 25 U.S.C. § 415 requires that leases of Indian land be approved by the Secretary." Id. at 200. The law is well established that "Indian trust property cannot be permitted, leased, or otherwise encumbered without the written approval of BIA." Larsen v. Acting Pacific Regional Director, 39 IBIA 202, 209 (2003).

The regulations governing leases on Indian trust lands are equally clear. Subsection 162.104(d) of 25 C.F.R. provides that any person or entity other than the Indian landowner "must obtain a lease under these regulations before taking possession" of Indian trust land. 3/ The regulations authorize Indian landowners to grant leases of their trust property, *subject to BIA's approval*. See 25 C.F.R. §§ 162.207(b) (agricultural leases), 162.604 (all leases under Part 162). "If a lease is required, and possession is taken without a lease by a party other than an Indian landowner of the tract, [BIA] will treat the unauthorized use as a trespass." 25 C.F.R. § 162.106(a); see also 25 C.F.R. § 162.101 (definitions of "Indian land," "lease," "trespass").

Appellant contends that because individual Indian allotted lands are transferrable, divisible, and inheritable, it necessarily follows that the Indian owners of such lands may authorize others to use their property without BIA approval. Appellant is incorrect. The ability of individual Indians to transfer, divide, and devise interests in trust property is constrained by Federal law, and subject to approval by the Secretary.

Cases cited by Appellant involving state law or non-Indian federal lands are not relevant here. See Jackson v. Portland Area Director, 35 IBIA at 200. The sole case cited by Appellant that involves Indian lands is United States v. Imperial Irrigation District, 799 F. Supp. 1052 (S.D. Cal. 1992). Although the court in that case cited the general legal proposition that "[a] peaceful entry on land by consent is not actionable," id. at 1059, the issue there was whether the *United States* had granted consent to the defendant's possession and occupation of Indian

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3/ Indian landowners, and parents or guardians of Indian minors who are landowners, are also required to obtain leases under specified conditions. See 25 C.F.R. § 162.104(a)-(c).

lands – not whether an Indian landowner's consent can defeat a trespass action by the United States, when it is undisputed that the United States as trustee has not consented. Nothing in that decision suggests that an Indian landowner has the authority, notwithstanding 25 U.S.C. § 415 and absent the Secretary's approval, to grant consent to a third party's use and occupancy of Indian trust land. 4/

The Regional Director noted, as additional authority for finding trespass, that although Appellant claimed to have obtained consent from some of the Indian owners, "[n]o lease or consents were obtained from the co-owners" of the allotments. The Regional Director cited 25 C.F.R. § 162.104(b), which provides: "An Indian landowner of a fractional interest in a tract must obtain a lease of the other trust and restricted interests in the tract, under these regulations, unless the Indian co-owners have given the landowner's permission to take or continue in possession without a lease."

Although it was not a necessary part of the Regional Director's decision, and does not affect the Board's conclusion that Appellant is in trespass, the Regional Director's reference to subsection 162.104(b) was incorrect. Subsection 162.104(b) applies to *Indian landowners* who hold fractional interests in trust property. Appellant does not claim that he is an Indian or that he holds any ownership interest in the allotments that he occupies. Therefore, subsection 162.104(b) is not relevant here, and the Regional Director instead should have referred to 25 C.F.R. § 162.104(d). As discussed earlier, subsection 162.104(d) requires that "[a]ny other person [i.e., other than Indian landowners or parents or guardians of Indian minors] * * * must obtain a lease under these regulations before taking possession" of Indian trust land. The Regional Director did, however, rely generally on 25 C.F.R. Part 162, which of course includes subsection 162.104(d). Therefore, the Board will modify the Regional Director's decision by vacating the paragraph that discusses subsection 162.104(b), and modifying the prior paragraph in his decision as follows: Following the reference to 25 C.F.R. Part 162, replace the period with a comma, and add "including, but not limited to 25 C.F.R. § 162.104(d)."

4/ The same holds true for Appellant's argument that the Tribe, by requiring him to remediate the property, has consented to his possession and occupancy of the property, thus defeating any claim of trespass. First, the Tribe is not the owner of the property, and cannot grant consent to Appellant's occupancy of the property, such that it would defeat a trespass action by the United States as trustee. Second, whatever personal presence on the property may be required of Appellant – with the consent of BIA and the Tribe (exercising governmental jurisdiction) and under their supervision and direction – in order for him to end his trespass by removing his vehicles, structures, equipment, and personal property; and vacate the property; cannot reasonably be construed as consent to have Appellant continue the trespass that is occurring by the presence of those vehicles, structures, equipment, and other property.

In summary, with respect to BIA's finding that Appellant is in trespass, it is undisputed that Appellant does not have a written agreement to occupy these trust lands, with the requisite BIA approval. Therefore, Appellant's occupancy is in violation of 25 U.S.C. § 415 and 25 C.F.R. Part 162, and the Board affirms BIA's decision, as modified above, finding that Appellant is in trespass. The Board affirms BIA's order to Appellant to cease and desist from further trespass by removing all materials, equipment, and structures from the property that are or have been in his possession or control or are otherwise attributable to his trespass.

Appellant also challenges the Regional Director's order that Appellant "restore the property to its original state prior to occupancy." Appellant contends that, under the facts of this case, BIA's order is unclear and needs to be more specific in describing what BIA expects him to do as restoration. Regardless of what BIA intended, however, there is a threshold problem with this portion of the Regional Director's decision, because it fails to articulate a legal basis for ordering Appellant to conduct restoration.

The regulations applicable to leases and permits for Indian trust lands provide that in the event of trespass, BIA will take action to recover possession on behalf of the Indian landowners, "and pursue any additional remedies available under applicable law." 25 C.F.R. § 162.106(a). BIA's trespass policy includes assessing penalties for the "cost of damage to * * * Indian agricultural land," and ensuring that damage to Indian agricultural lands "is rehabilitated and stabilized at the expense of the trespasser." 25 C.F.R. § 166.801(c), (d). The actions available to BIA under 25 C.F.R. § 166.806 include assessing penalties, damages, and costs associated with a trespass – e.g., making a trespasser pay for the cost (or bear the expense) of restoration – but do not expressly authorize BIA to order a trespasser to conduct restoration and rehabilitation of the property.

Because 25 C.F.R. Part 162 does not authorize BIA to order a trespasser to conduct restoration, and because the Regional Director did not invoke any other legal authority as the basis for the restoration order, the Board vacates that portion of the Regional Director's decision and remands this issue to him for further consideration. If the Regional Director believes he has a legal basis other than 25 C.F.R. Part 162 for ordering Appellant to conduct restoration, he may reissue the order, explain the legal basis, and address Appellant's argument that greater specificity is required as to what constitutes restoration. 5/

Appellant also contends that there is no evidence to support BIA's finding that Appellant violated the Tribe's solid waste ordinance, which prohibits the disposal of solid waste

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5/ Even if BIA lacks authority to order a trespasser to conduct restoration, the Board is not suggesting that BIA could not give trespassers a choice between conducting necessary restoration actions themselves (under BIA supervision), and paying for the cost of restoration by BIA. In the decision at issue in this appeal, however, BIA did not give Appellant a choice.

on any location within the Reservation. Appellant did not raise this argument in his appeal to the Regional Director from the Superintendent's decision. The Board has a well-established practice of declining to consider arguments raised for the first time on appeal, and therefore will not consider Appellant's argument here. See, e.g., Shoshone-Bannock Tribal Credit Program v. Portland Area Director, 35 IBIA 110, 114-15 (2000); Welk Park North v. Acting Sacramento Area Director, 29 IBIA 213, 219 (1996). 6/

Appellant represents to the Board that if required and given a reasonable time, he will remove the vehicles. The Superintendent's decision, the effect of which has been stayed pending this appeal, gave Appellant 30 days to comply. In his appeal to the Board, Appellant does not contest the 30-day time period provided in the Superintendent's decision or contend that 30 days is unreasonable. Cf. Allgood v. Portland Area Director, 29 IBIA 153, 155 (1996) (appellants given 30 days to remove non-permanent improvements). As such, the Board notes that the time period for compliance contained in the Superintendent's letter, with respect to those portions of the Regional Director's decision that are affirmed by this order, becomes effective upon Appellant's receipt of this order.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms, as modified, the Regional Director's decision finding Appellant in trespass on Indian trust lands; affirms his order that Appellant remove from the property all surface and subsurface structures and materials that are or have been in the possession or control of Appellant or are otherwise attributable to Appellant; and affirms the Regional Director's order that Appellant cease and desist from further trespass. The Board vacates and remands for further consideration, consistent with this opinion, that portion of the Regional Director's decision ordering Appellant to restore the property to its original state prior to his occupancy.

// original signed	// original signed
Steven K. Linscheid	Colette J. Winston
Chief Administrative Judge	Administrative Judge

6/ In any event, neither of the BIA decisions purports to order a remedy based separately on a violation of the tribal ordinance, and neither the finding of trespass under federal law and regulations, nor the remedies ordered, are dependent upon a finding that Appellant violated the tribal ordinance.